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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

Case No._____

Larry Dean Bowens, et al.,
Petitioners,

V.

The Board of Law Examiners
of the State of
North Carolina, et al.,
Respondents.

Petition for Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the North Carolina Board of Law Examiners' procedure for review, which does not afford an allegedly failed applicant an opportunity for a hearing before the examiner(s) themselves nor in the state's highest court, is constitutionally infirm under the Due Process Clause of the United States Constitution and/or caselaw interpreting the Due Process Clause?

2. Whether petitioners' Sherman Act claim, alleging anti-competitive activity by respondents to artificially limit new admittees to the state's bar without a clearly articulated judicial or legislative mandate to displace such competition with state control, is barred by the state action exemption to the anti-trust laws?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ----------1

TABLE OF AUTHORITIES----------3

JURISDICTIONAL STATEMENT----------4

CONSTITUTIONAL/STATUTORY PROVISIONS----6

STATEMENT OF THE CASE ----------7

REASONS FOR GRANTING THE WRIT ----------8

CONCLUSION----------16

APPENDIX A ----------17

B----------19

C ----------39

D ----------40

E----------42

TABLE OF AUTHORITIES

Pages Cited

Bates v. State Bar of Arizona, 433 U.S. 350 (1977)-------14
Calif. Retail Liquor Dealers v. Midcal,
445 U.S. 97 (1980)----------15
Canter v. Detroit Edison Co., 428 U.S. 579 (1976)-------13
City of Boulder, 455 U.S. 54-55----------13, 14
City of LaFayette, 435 U.S. 410----------13
General Statutes of N.C. Sec. 84-24 ----------14
Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) ----------15
Hannah v. Larche, 363 U.S. 420 (1960)----------10
Harper v. District of Columbia Committee on
Admissions, 375 A. 2d 25 (1977) ----------9
In Re Applicants For License,
143 N.C. 1 (1906)----------14
Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123, 140----------11
Lucero v. Ogden, 718 F. 2d 355 (10th Cir., 1983) ----------9
Parker v. Brown, 317 U.S. 341 (1943)----------13
Parrish v. Alabama State Bar,
533 F.2d 942 (5th Cir. 1976) ----------9
Richardson v. McFadden, on rehearing en banc,
563 F.2nd 1130 (4th Cir., 1977)----------8, 9
Rogers v. Supreme Court of Virginia, **Unpublished,**
(4th Cir., 1985) Slip Op. No. 84-1746 ----------8, 9
Singleton v. Louisiana State Bar Assoc.,
143 F. Supp. 1092, (E.D. La., 1976)----------9
Whitfield v. Illionis Board of Law Examiners,
504 F.2d 474 (7th Cir., 1974) ----------9
Woodward v. Virginia Board of Law Examiners,
454 F. Supp. 4 (E.D. Va. 1978), aff'd, 598
F.2d 1343, (4th Cir. 1979)----------8, 9

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Larry Dean Bowens, et al.,
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V.

The Board of Law Examiners of the State of North Carolina, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit entered on November 12, 1986.

OPINION BELOW

The Court of Appeals entered its Per Curiam decision on November 12, 1986 affirming the district court's Order dated January 6, 1986 which, **inter alia,** granted respondents summary judgement on petitioners' due process claim, denied petitioners' cross motion for summary judgement on their due process claim, denied petitioners' motion to amend, and reaffirmed a purported dismissal of petitioners' Title VII claim.

A copy of the per curiam decision and the district court order are attached respectively as Appendix A and B. The Court of Appeals denied petitioners' petition for rehearing and stay of mandate on December 29, 1986. A copy of the order is attched as Appendix C.

PARTIES[1]

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[1] The parties to the proceeding of this matter in the lower courts are the following:

Larry Dean Bowens, D. Lester Diggs, Clifton Edward Graves, Jr., Earl Frederick Jones, G. Angaza Laughinghouse, Emery L. Rann, III, and Marion Weaver,

Appellants,

versus

The Board of Law Examiners of the State of North Carolina: Horace E. Stacy, Jr., Individually and in his representative capacity as Chairman of the Board of Law Examiners of the State of N.C., W. H. McElwee, Walter R. McGuire, Francis I. Parker, Eric C. Michaux, James Mullen, C. Edwin Allman, John T. Allred, John D. Warlick, Jr., James L. Nelson and Arch Schoch, Jr., Individually and in their representative capacities as members of the Board of Law Examiners of the State of N.C., and Fred P. Parker, III, Individually and in his official capacity as Executive Secretary to the Board of Law Examiners of the State of N.C.,

Respondents.

JURISDICTION

On November 12, 1986 the Court of Appeals entered judgement affirming summary judgement in favor of respondents on all issues before the district court. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment V.

   Nor shall any person...be deprived of life, liberty, or property, without due process of law...

2. Title 15, United States Code, Sections 1.

   Every contract, combination...or conspiracy, in restraint of trade or commerce...is hereby declared to be illegal.

3. Title 42, United States Code, Section 2000e-2.

   It shall be an unlawful employment practice for an employer...or employment agency...to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race, color, religion, or national origin.

STATEMENT OF THE CASE

Petitioners, who are allegedly unsuccessful black applicants for admission to practice law in the State of North Carolina, brought this action in June of 1982 in the Western District of North Carolina alleging that their failure to pass prior bar examinations and the procedures for review of those examinations were due to violations of certain of their constitutional rights. Specifically, their complaint alleges that (1) the administration and grading of the examination discriminates on the basis of race because bar examination applications and the examinations themselves are segregated on the basis of race; (2) the plaintiffs' individual examinations were not graded but instead were arbitrarily assigned a failing grade; (3) plaintiffs' individual examination papers were graded arbitrarily and capriciously with their answers susbstantially equal or superior to answers provided by successful white applicants; (4) that blacks fail the exam in a grossly disproportionate number compared to white applicants and (5) the failure to provide a hearing to challenge the grading of the Board of Law Examiners violates due process. With respect to claims 1 through 4, the complaint also contends that defendants' actions violate 42 U.S.C. Section 1981, 42 U.S.C. Section 1983 and Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e, et seq. [2]

In July of 1982, defendants filed a motion to dismiss for improper venue (or alternatively for change of venue), lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The action was transferred to the Eastern District of North Carolina

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[2] Petitioners' claim under the Sherman Act, 15 U.S.C. Section 1 and 2, was brought in an amended complaint. Leave to amend was denied by the district court upon a conclusion that this claim was barred by the state action exemption to the anti-trust laws.

where, on the authority of **Richardson v. McFadden,** 563 F.2d 1130 (4th Cir. 1977), **cert. denied,** 435 U.S. 968 (1978), and **Woodward v. Virginia Board of Bar Examiners,** 454 F.Supp. 4 (E.D.Va 1978), **aff'd,**598 F.2d 1343 (4th Cir. 1979), the Court dismissed the action.

On a first appeal to the Fourth Circuit Court of Appeals, the action was vacted and remanded for reconsideration in light of a letter from the Clerk of the North Carolina Supreme Court to plaintiff D. Lester Diggs filed during the pendency of the appeal stating that "(t)here is no right of appeal provided from a board determination that the applicant has failed the examination." (App. D). On remand to the Eastern District, all claims were again dismissed and a second appeal to the Fourth Circuit Court of Appeals followed. The same panel of the Fourth Circuit that vacated and remanded the dismissal in the first appeal affirmed the dismissal in the second appeal, with no discussion of the letter from the North Carolina Supreme Court which was the expressed basis of the initial remand.

Although the district court found that petitioners had no opportunity for a post-deprivation hearing before any body, it nevertheless concluded as a matter of law that respondents' review procedure was adequate. It is the affirmance of this conclusion which petitioners are asking this Court to review by writ of certiorari.

REASONS FOR GRANTING THE WRIT

Due process demands that a failed applicant for admission to practice law be provided at least a discretionary—as opposed to an absolute—opportunity for a review hearing.

In **Rogers v. Supreme Court of Virginia,** the Fourth Circuit Court of Appeals articulated two general prin-

ciples with respect to what process is due disappointed bar applicants. The first is "(t)hat a state may not deny a person a license to practice law in a manner that contravenes the due process clause," and second "(t)hat this circuit has not formulated precise guidelines for what process is due disappointed bar examinees." Opinion No. 84-1746 at page 4 (August 22, 1985).

Thus the Fourth Circuit in **Rogers,** not unlike most other circuits, left unsettled an important question of federal law. Because the due process question respecting bar applicants has, and most likely will, continue to flood federal court dockets, this Court should issue its writ to establish the nature and extent of constitutionally adequate review procedures.

Due process challenges to review procedures for failed bar applicants have been numerous and with varying results in recent years. See **Whitfield v. Illinois Board of Law Examiners,** 504 F.2d 474 (7th Cir., 1974); **Singleton v. Louisiana State Bar Association,** 143 F.Supp. 1092 (E.D. La. 1976); **Parrish v. Alabama State Bar,** 533 F.2d 942 (5th Cir., 1976); **Richardson v. McFadded,** 540 F.2d 744 (4th Cir., 1976), **on rehearing en banc,** 563 F.2d 1130 (4th Cir., 1977); **Harper v. Dist. of Columbia Committee on Admissions,** 375 A.2d 25 (1977); **Woodard v. Virginia Board of Bar Examiners,** 454 F. Supp. 4(E.D. Va., 1978), **aff'd** 598 F.2d 1343 (4th Cir., 1979); **Rogers v. Supreme Court of Virginia, supra; Lucero v. Ogden,** 718 F.2d 355 (10th Cir., 1983); **cert. denied,** 104 S. Ct. 1308 (1984).

The Fourth Circuit in Rogers was guided by the principle "(t)hat the content of due process varies with each factual context." Id. at page 5.

This principle is a glaring articulation of the need of this Court to establish minimum due process requirements so that future due process challenges to post-deprivation procedures can be measured by the existence, or non-existence, of minimum procedural trappings

rather than by subjective ramblings through, and subtle distinctions among, the factual context of the challenge.

The lower courts relied upon **Hannah v. Larche,** 363 U.S. 420 (1960) as authority to measure due process challenges by their factual context. This case involved a due process challenge to certain Rules of Procedure adopted by the Commission on Civil Rights governing the conduct of its investigations. The specific questions decided in **Hannah** were (1) whether the Commission was authorized by Congress to adopt the Rules of Procedure challenged by respondents, and (2) if so, whether those procedures violated the Due Process Clause of the Fifth Amendment.

In the opinion, this Court noted that "Due Process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." The opinion went on to provide more pointed inquiries to be made by federal courts in measuring due process challenges:

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is **imperative** that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when govermental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. (Emphasis Added).

In **Greene v. McElroy,** 360 U.S. 474, this Court considered the constitutionality of post-deprivation review afforded petitioner Greene by the Security Clearance Boards and noted that the various Security Clearance

Boards involved here were not conducting an investigation; they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact on his employment. Therefore, this Court held that Greene was entitled, by virtue of the Due Process Clause, to review procedures traditionally associated with the judicial process which has always included a hearing.

The Court reached the same result in **Joint Anti-Fascist Refugee Comm. v. McGrath,** 341 U.S. 123, 140-141, where it held that the Attorney General's actions constituted an adjudication, and that therefore the petitioner was entitled to the full panoply of judicial procedures upon review of the challenged deprivation.

The Fourth Circuit and district court, while noting **Hannah** (App. B., Page 36), ignored the investigation/adjudication dichotomy articulated by the Court in passing upon petitioners' due process challenge. Having determined and adjudged that petitioners are not entitled to practice law, and having withheld from petitioners a license to do so, respondents must provide petitioners at least an opportunity for a hearing to challenge this deprivation.

The panel in Rogers stated that "(W)e do not think that an examinee has **an absolute right** to have a failing examination reviewed in the state supreme court,...nor an unlimited number of reviews of failing examinations." Id. at page 2. In North Carolina, petitioners have **absolutely no right,** not even discretionary opportunity, for review of their deprivation—neither by the examiners nor in the state supreme court. Particularly in North Carolina, where black examinees fail its bar at a grossly disproportionate rate than white examinees (See App. E), is there a need for this Court to articulate the procedural requirements of constitutionally adequate review.

On a larger scale, all bar applicants, bar examining boards as well as the federal courts would benefit greatly from a decision of this Court respecting constitutionally sufficient post-deprivation review. Failed bar applicants—and there are many—would save the time and expense of litigational challenges to state review procedures that substantially conform to requirements articulated by this Court. Bar examining boards would no longer be left to conjecture whether their post-deprivation procedure passes muster. Federal courts would more likely maintain some semblance of judicial harmony in passing upon due process challenges of this type.

Even if this Court is not prepared to establish a checklist of procedural requirements, petitioners nevertheless ask this Court to review the lower courts' determination that petitioners, in spite of having no opportunity for a hearing before the bar examiners nor in the state's highest court, have suffered no violation of their constitutional rights.

The state action exemption to the Sherman Act does not shield respondents from liabiltiy for their alleged anti-competitive activity in denying petitioners a license to practice law.

In an amended complaint, petitioners alleged that defendants entered into a combination and conspiracy, and thereby created an artificial restraint upon competition among members of the N.C. bar, by adjusting raw scores to limit the number of new admittees in general, and new black admittees in particular, to the state's bar. The district court denied petitioners leave to amend upon the conclusion that the claim is clearly barred by the state action exemption to the antitrust laws. The Fourth Circuit Court of Appeals found no merit in petitioners' assignment of error on this question.

The state action doctrine rests on principles of federalism first articulated in **Parker v. Brown,** 317 U.S. 341 (1943). There this Court noted that the Sherman Act was intended as a broad prohibition against restraints imposed on competition by private conduct. Because Congress had not addressed state-imposed restraints in either the Act or its history, however, this Court declined to impute to Congress an intent to prohibit "state action or official action directed by a state." 317 U.S. at 351. At the same time, this Court emphasized that the state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful (ibid.). These complementary concepts of federalism underlying **Parker** focus judicial scrutiny on the question whether the challenged restraint on competition is properly attributable to the decision of the state as sovereign to displace competition with state control of the conduct at issue.

For purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign. **City of LaFayette,** 435 U.S. at 410 (opinion of Brennan, J.); **City of Boulder,** 455 U.S. at 53-54. When the restraint at issue is imposed by a subordinate state agency, this Court has held that it is to be attributed to the state only if the legislature or supreme court has clearly articulated a policy to displace a particular aspect of competition with state control, and the agency has acted in furtherance of that mandate. **City of LaFayette,** 435 U.S. at 410, 413, 415 (opinion of Brennan, J.); **City of Boulder,** 455 U.S. at 54-55. It is not enough that the state has given the agency a general regulartory authority to implement a broad public interest standard (ibid.), or articulated a policy to displace competition in some other area of an industry's activities. Cf. **Canter v. Detroit Edison Co.,** 428 U.S. 579 (1976). Such a mandate may indicate nothing more than sovereign neutrality concerning the challenged

restraint—an assertion of authority to ambiguous to confer state action immunity. **City of Boulder,** 455 U.S. at 55.

The lower courts sought to draw solace from **Bates v. State Bar of Arizona,** 433 U.S. 350 (1977) in denying petitioners leave to plead their Sherman Act claim. In that case, the Arizona State Bar disciplined Bates for violation of a disciplinary rule prohibiting advertisement by members of its bar. Bates challenged the rule as a violation of the Sherman Act alleging that the rule restrained trade and commerce. The Arizona Supreme Court held that Bate's claim was barred by state action exemption to the Act.

In upholding this ruling, this Court noted:

> The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover,...the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. We deem it significant that the state policy is so clearly expressed and that the State's supervision is so active.

In contrast, the North Carolina Supreme Court has no policy or supervision of matters of admission to its bar. (App. D). While the North Carolina legislature has delegated authority to the respondent board to establish qualifications for admission to the bar, **In Re Applicants For License,** 143 N.C. 1 (1906); General Statutes of N.C. Sec. 84-24, it has also not articulated or expressed any state policy to displace competition among attorneys with state control.

The state's decision to regulate bar admissions standing alone is not sufficient to immunize alleged anticompetitive restrictions imposed by the bar examiners;

rather, the bar examiners' conduct can be exempt only if it satisfies the test set out in **California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.**, 445 U.S. 97, 105 (1980). The Midcal test, as developed in recent state action decisions, requires that the challenged restraint must be **"clearly articulated and affirmatively expressed as state policy."** If the challenged conduct is not specifically authorized by state policy, it may nevertheless satisfy the Midcal test if it is clearly necessary to effect state policy regarding competition. Id. at Page 105.

In **Goldfarb v. Virginia State Bar,** 421 U.S. 733 (1975), the Court addressed the issue of whether a minimum fee schedule established by the Virginia State Bar was immune under state action. Under the rules of the Virginia Supreme Court, the State Bar, a quasi-state agency, has the responsibility of enforcing disciplinary rules governing members of the bar. Through its enforcement mechanism, the State Bar mandated a minimum fee schedule for legal services. The Court held that enforcement of the fee schedule was not immune because it was imposed by the State Bar and not by the state supreme court. In its decision, the Court explained:

> The treshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign . . . . Here we need not inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules requires the anticompetitive activities of either respondent. . .The fact that the State Bar is a state agency for some limited purposes does not create an anti-trust shield that allows it to foster anticompetitive practices for the benefit of its members.

421 U.S. at 790 (emphasis added) (citations and footnote omitted).

Assuming, as we must, that the petitioners' allegations of a **per se** unreasonable group boycott by respondents are true, the bar examiners may escape liability only by showing that petitioners' allegations of anti-competitive activity are untrue or that the agency itself was expressly given a legislative or judicial mandate to impose the artificial restraint. Nothing in the record before the lower courts established such a mandate.

Therefore, petitioners seek the writ of certiorari of this Court to review the judgements of the lower courts that petitioners' Sherman Act claim is barred and therefore could not be plead in an amended complaint.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1511

Larry Dean Bowens, D. Lester Diggs, Clifton Edward Graves, Jr., Earl Frederick Jones, G. Angaza Laughinghouse, Emery L. Rann, III, and Marion Weaver,

Appellants,

versus

The Board of Law Examiners of the State of North Carolina: Horace E. Stacy, Jr., Individually and in his representative capacity as Chairman of the Board of Law Examiners of the State of N.C., W. H. McElwee, Walter R. McGuire, Francis I. Parker, Eric C. Michaux, James Mullen, C. Edwin Allman, John T. Allred, John D. Warlick, Jr., James L. Nelson and Arch Schoch, Jr., Individually and in their representative capacities as members of the Board of Law Examiners of the State of N.C., and Fred P. Parker, III, Individually and in his official capacity as Executive Secretary to the Board of Law Examiners of the State of N.C.,

Appellees.

APPENDIX A

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge. (C/A No. 82-1224-CIV-5)

Submitted: May 30, 1986 Decided: November 12, 1986

Before WIDENER, PHILLIPS and ERVIN, Circuit Judges.

(Larry Dean Bowens, D. Lester Diggs, Clifton Edward Graves, Jr., Earl Frederick Jones, G. Angaza Laughinghouse, Emery L. Rann, III, Marion Weaver, Appellants Pro Se. E. Osborne Ayscue, Jr., Helms, Mulliss, Johnston, for Appellees.)

PER CURIAM:

A review of the record and the district court's opinion discloses that this appeal from the court's order denying relief is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. **Bowens v. Board of Law Examiners**, C/A No. 82-1224-CIV-5 (E.D.N.C., Jan. 6, 1986).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

LARRY DEAN BOWENS, et al.,	)	
	)	
Plaintiffs	)	
	)	
VS.	)	**NO. 82-1224-CIV-5**
	)	
THE BOARD OF LAW EXAMINERS FOR THE STATE OF NORTH CAROLINA, et al.,	)	**O R D E R**
Defendants	)	

Plaintiffs, who are unsuccessful black applicants for admission to practice law in the State of North Carolina, brought this action in June of 1982 in the Western District of North Carolina alleging that their failure to pass prior bar examinations and the procedures for review of those examinations were due to violations of certain of their constitutional rights. Specifically, their complaint alleges that (1) the administration and grading of the examination discriminates on the basis of race because bar examination applications and the examinations themselves are segregated on the basis of race; (2) the individual examinations were not graded but instead were arbitrarily assigned a failing grade; (3) plaintiffs' individual examination papers were graded arbitrarily and capriciously with their answers substantially equal or superior to answers provided by successful applicants; (4) the bar examination itself discriminates on the basis of race; and (5) the failure to provide a hearing to challenge the grading of the Board of Law Examiners violates due process. With respect to claims 1 through 4, plaintiffs also contend that defendants' actions violate 42 U.S.C. § 1981 and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, **et seq.**

APPENDIX B

In July of 1982, defendants filed a motion to dismiss for improper venue, lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The action was transferred to this district, and on the authority of **Richardson v. McFadden,** 563 F.2d 1130 (4th Cir. 1977), **cert. denied,** 435 U.S. 968 (1978), and **Woodard v. Virginia Board of Bar Examiners,** 454 F.Supp. (E.D.Va. 1978), **aff'd,** 598 F.2d 1343 (4th Cir. 1979), this court dismissed the action.

On appeal, the action was vacated and remanded for reconsideration in light of a letter from the Clerk of the North Carolina Supreme Court to plaintiff D. Lester Diggs filed during the pendency of the appeal stating that "(t)here is no right of appeal provided from a board determination that the applicant has failed the examination." On remand, defendants' renewed motion to dismiss was denied on all counts except with respect to plaintiffs' Title VII claims.[1]

The action is now before the court on plaintiffs' renewed motion to amend the complaint to add a Sherman Act claim, defendants' motion for summary judgment on all claims, plaintiffs' cross-motion for summary judgment on claim 5, the due process claim, and defendants' motion in limine to exclude the testimony of Professor Mary Jane Williams from the trial of this action. These motions will be addressed seriatim.

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1 Plaintiffs still apparently contend that their Title VII claims survived defendants' motion to dismiss. Defendants, in an abundance of caution, filed a renewed motion to dismiss this claim. However, the court need not rule on this motion, since the Title VII claim was dismissed in the court's order of August 9, 1984.

PLAINTIFFS' MOTION TO AMEND

Plaintiffs' proposed amendment to the complaint, set out in their fifth cause of action, alleges that defendants limit the number of applicants who pass the bar examination based on a pre-set standard without regard to achievement by each applicant. They contend that this activity constitutes restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, **et seq.** Defendants oppose the motion to amend, alleging that such a claim is barred by the state action exemption to the antitrust laws.

Upon review of the parties' memoranda and the relevant case law, the court is inclined to agree with defendants. While leave to amend pleadings should be freely given when justice so requires, Rule 15 (a), F.R.Civ.P., it should not be given when it is clear that the claim would be futile because of substantive or procedural considerations. **Davis v. Piper Aircraft Corporation,** 615 F.2d 606 (4th Cir.), **cert. dismissed,** 448 U.S. 911 (1980). Here, plaintiffs' Sherman Act claim is clearly barred by the state action exemption to the antitrust laws. **Bates v. State Bar of Arizona,** 433 U.S. 350 (1977); **Rogers v. Supreme Court of Virginia,** No. 84-1746, Slip Op. at 6 (4th Cir., August 22, 1985) (unpublished). Therefore, the inclusion of that claim would be futile, and their motion to amend accordingly will be denied.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM OF RACIAL DISCRIMINATION

As set out in claims 1 through 4, **supra,** plaintiffs contend that defendants have intentionally engaged in discrimination against black applicants to the state bar in violation of 42 U.S.C. § 1981 and the equal protection clause of the Fourteenth Amendment. However, defendants now assert that the undisputed facts show that none of the discriminatory acts alleged in those claims are true.

In support of this contention, defendants have submitted the affidavit of Fred P. Parker, III, the Executive Secretary of the Board of Law Examiners. Because the Board's position on the equal protection issue is thoroughly addressed in this affidavit, the pertinent portions of the affidavit will be repeated in their entirety.

> 6. The allegation that applications to take the bar examination in North Carolina were or are segregated on the basis of race is false. the form which the applicant fills out to take the North Carolina Bar Examination contains no designation as the applicant's race. Applications are filed alphabetically by examination date and are not otherwise segregated.
>
> 7. The allegation that essay examination papers are segregated on the basis of race is false. Upon reporting to the location at which the bar examination is given, applicants check in and select a seat of their own choosing. After all the applicants are seated, the persons who proctor the examination (all or most of whom are lawyers employed by the North Carolina Attorney General) are given blank envelopes, each containing a prenumbered card, which have previously been shuffled by the Board's staff. Those envelopes are distributed at random by the proctors. The card inside each envelope contains a line on which applicants are instructed to print their names. (In recent years the card has also contained a second space for the entry of the applicant's birth date, a safequard employed by the Board to avoid confusion in event that

there are applicants with identical names.) The applicant writes his or her name and birth date on the card, places the card in the envelope and seals it, after first writing down his or her examination number for the applicant's own future reference. The proctors then pick up the sealed envelopes. Once this is done, the envelopes are counted to make sure that the number of envelopes corresponds with the number of applicants who have signed in to take the examination. At this point the Clerk of the North Carolina Supreme Court, who is present, takes possession of the sealed envelopes and takes them to his office, where he maintains them in his separate custody until after the examination papers have been graded.

8. Applicants are given a photo I.D. card when they report for the first session of the bar examination. At the end of the last session, the cards are collected and delivered to the Clerk of the Supreme Court, who maintains possession of them until after the results of the examination have been announced. In addition, the Board staff constructs a seating chart for each examination. Each applicant writes his or examination number and seat number, but **not** his name, on a card. The cards are then taken up by proctors in order. If an applicant forgets of loses his or her examination number, the chief proctor, who is not an employee of the Board, can ascertain the applicant's examina-

tion number by locating his or her seat card. The cards are retained until after the examinations are graded in the event that it becomes necessary to use them to determine whether particular examinees were sitting next to one another.

9. At each session of the bar examination the applicant is given one or more booklets containing the questions to be answered during that session. Each question is followed by a blank sheet of paper to be used by the applicant for writing his or her answer. The pages that comprise thebooklet are stapled together. Each booklet contains a space on its cover page for the applicant to write in his or her examination number. The applicant places no other identification on the examination booklet.

10. When the examination booklet or booklets are handed in at the end of each session, the proctors count them, arrange them in numerical order by examination number and place them in boxes. The Board's staff attaches a grading sheet or sheets to the back of each booklet. Completed examination booklets are not segregated on the basis of race, nor is the race or identity of the examinee indicated on any examination booklet. The booklets are identified only by the examination number placed on them by the applicants.

11. The MBE, which is administered in two three-hour sessions on one day of the bar examination, is prepared by the National Conference of Bar Examiners. At the beginning of

each session, each applicant is given a booklet containing the questions to be answered and a separate answer sheet. Each booklet contains 100 multiple choice questions. The only identification placed on the applicant's answer sheet are his examination number), and the applicant's date of birth. The applicant is also instructed to write in the state code, which identifies the state in which the applicant is sitting for the examination. (The applicant also blackens over spaces on the answer sheet to correspond with the nunbers that have been written in the blocks set aside for his examination number, his date of birth, and the state code.) The applicant answers the multiple choice questions by filling in the appropriate oval spaces on the answer sheet with a pencil. At the end of each session, the proctors collect the booklets and the answer sheets. They count and pack the booklets separately. They arrange the answer sheets in numerical order by examination number. The answer sheets are delivered to me, as Executive Secretary of the Board. I place them in a container and either deliver or transmit them to the test scoring center. Through 1983 that center was the Educational Testing Service in Princeton, New Jersey. Since that time the answers have been sent to Iowa City, Iowa, where they are graded at the American College of Testing. The MBE Answer Sheets are machine graded. The Board of Law Examiners receives from the testing service two printouts. One contains the applicants' examination numbers in numerical order with the scores of each applicant displayed alongside his examination number.

The other printout lists the applicants in order of scores from the one schieving the highest score to the one achieving the lowest score. Both printouts show for each applicant his or her raw MBE score, his or her scaled MBE score, his or her percentile and the score covered by the MBE.

12. Every examination booklet is graded in the following manner: Each grader is assigned one or more questions to grade. He grades the answer of every applicant to each question assigned him. At the present time, two graders grade each question. The purpose of having the same graders grade every applicant's answer to a particular question is to ensure that each applicant's answer to a question is graded on a basis that is consistent with the grading of the answer to that question given by every other applicant. In grading an answer, the grader uses a model answer to the question approved by the Board at the same time that it approved the question for use on the examination. In order to establish a base line for grading a question, a grader normally "cuts a pattern" by reading the answer to a particular question on forty or fifty or more examination papers to get a feel for how applicants generally handle the question. The grader then starts back and grades all of the answers to that particular question.

13. Each grader places his score for each answer he grades on the grading sheet attached to the test booklet. What the grader grades is an answer in a booklet that contains only an

examination number to identify it. All examination papers are graded in this fashion. He also records the grade he assigns an applicant's answer to the question he is grading on a separate grading sheet, which he retains.

14. After examinations are graded, the individual scores are collated and totalled on a tally card, bearing an examination number, which is prepared for each examinee. That tally card contains spaces for all of the scores assigned by graders to the applicant's answers to individual questions, a space for entry of the score of the applicant on the multi-state bar examination (MBE) and a space for the applicant's total score. The Board's staff transfers scores from the grading sheets to the tally card bearing the corresponding examination number and enters the MBE score of each applicant on the tally card bearing his examination number. The tally card is so constructed that scores are added in two directions and totalled to make sure that the totals are the same. The accuracy of the transfer of the MBE scores of all applicants to their respective tally sheets is verified by having one person read out each examination number and the corresponding MBE score, while another person checks the accuracy of that score as noted on the tally card bearing that number.

15. After the tally cards are completed, the Board and its staff review the grading of the applicants who have failed the examination

to insure that no errors have been made in transferring the scores assigned to individual questions. In the presence of all of the examiners, each of whom has his own examiner's grading sheet in front of him, showing the grade he assigned to the answer of each applicant, each member of the Board calls out the grade he assigned that particular applicant for that particular question from his own grading sheet. A member of the staff follows this process on the grading sheets that were attached to the individual applicants' answer booklets to inure that the score on each grading sheet matches the score the grader wrote down on his examiner's grading sheet. Another member of the staff verifies that the grade being called out was also correctly entered on the applicant's tally card. If any errors are discovered, the scores on the tally card are recalculated in two directions in order to check the accuracy of the addition.

16. After all answers on all examination papers have been graded and the recording of the grades rechecked for accuracy, the Clerk of the Supreme Court delivers to the Board a list he has prepared after the bar examination that contains the name of the applicant, his or her examination number and a blank for use in recording whether or not the applicant passed or failed the examination. The Clerk constructs this list by taking a list prepared by the staff of the Board containing the names of those persons certified to take the bar examination (with those people who did not

report to the examination center to take the examination noted thereon) and entering the examination number of each applicant by his name. He matches the names with the examination numbers by opening the sealed envelopes which were delivered to him on the first day of the bar examination and entering the examination numbers alongside the appropriate names.

17. In a meeting at which the Board and members of the staff are present, the tally cards are divided among the members of the Board. The Executive Secretary then calls out the examination number and name of each applicant on the list provided him by the Clerk of the Supreme Court, the Board member who has the tally card bearing that number indicates orally whether that person passed or failed and the Executive Secretary makes the appropriate notation by the applicant's name on the list. It is only at this point that any member of the Board or its staff knows what examination number was assigned to a particular applicant, which examination booklets were written by which applicants and which applicants have passed or failed the examination.

In response to the allegations raised in this affidavit, plaintiffs assert that with respect to the equal protection claims, genuine issues of fact remain which make summary judgment inappropriate. Specifically, they assert that racial discrimination can be inferred from the following factors: (1) the fact that scores for individual questions on the July, 1979 and July, 1980 exams are not available supports plaintiffs' contention that their essay

exams were never graded; (2) defendants' ability to determine the race of applicants by use of required fingerprints and photographs, both of which must accompany the application for admission, supports plaintiffs' contention that applications and examinations are segregated on the basis of race; (3) answers to interrogatories permit the court to infer that defendants spent approximately two minutes grading each question on some of plaintiffs' examinations, thus supporting plaintiffs' claim of arbitrary grading; (4) plaintiffs' affidavit supports their contention that they wrote answers to their essay exams which were equal to or superior to those of successful white candidates; and (5) the higher percentage of unsuccessful black applicants to the bar indicates that defendants have either intentionally discriminated against blacks or that the bar examination as written improperly discriminates against blacks.

With respect to defendants' failure to provide scores for the 1979 and 1980 bar exams, defendants explain that they have a policy of destroying **all** examination papers after a certain period of time. Thus, they assert, plaintiffs can show no racial bias with respect to the destruction of their examinations for those years. Plaintiffs offer nothing to refute this assertion, and the court must agree that defendants' practice does not unfairly impact on black applicants.

As to plaintiffs' second assertion regarding defendants' ability to determine the race of applicants, such an allegation does not support the inference that defendants made such a determination prior to the grading of examinations. Plaintiffs again offer no concrete evidence to refute Mr. Parker's outline of defendants' procedures, and absent more, their conclusional allegations of racial prejudice cannot survive a motion for summary judgment. **Chapman v. Reynolds,** 378 F.Supp. 1137 (W.D.VA. 1974); **Bowens v. Board of Law Examiners,** 57

N.C.App. 78, 83, 291 S.E.2d 170, 173 (1982).

Regarding plaintiffs' claim of arbitrary grading, the plaintiffs fail to show how they came up with the conclusion that as little as two minutes were spent grading their papers, and upon review of the answers to interrogatories cited in their memorandum, the court can find nothing which would support this conclusion.

Plaintiffs' self-serving assertion that their answers are as good as those of white candidates also fails to support their claim of discrimination. If the bar examiners do not know the race of the people whose exams they are grading, then they cannot possibly be intentionally grading them differently for blacks and whites. As plaintiffs have failed to offer any evidence to support their contention that the examinations of black and white applicants are graded separately, their claims regarding racially discriminatory grading must fail.

Plaintiffs' final contention regarding their equal protection claim alleges that the disproportionate number of black defendants are intentionally discriminating against blacks or that the bar exam as written unfairly discriminates against black examinees. **See Village of Arlington Heights v. Metropolitan Housing Development Corporation,** 429 U.S. 252 (1977). Unfortunately for plaintiffs, this specific contention has been rejected by all courts before which it has been raised. For example, in **Tyler v. Vickery,** 517 F.2d 1089, 1103 (5th Cir. 1975), **cert. denied,** 426 U.S. 940 (1976), the Fifth Circuit Court of Appeals affirmed the district court's holding that the Georgia bar examination had a rational relationship to the applicants' fitness to practice law and was not inherently discriminatory against blacks by virtue of the mere fact that the examination was failed by a much higher percentage of blacks than whites. **Accord, United States v. State of South Carolina,** 445 F.Supp. 1094, 1109 (D.S.C. 1977), **aff'd,** 582 F.2d 869 (4th Cir. 1978). As in

Georgia, the Board of Law Examiners of this state have a legitimate interest in insuring that applicants for licensure meet certain minimum standards. The fact that a disproportionate number of blacks have failed to meet those standards will not, in and of itself, state a claim of discrimination. As plaintiffs have failed, after exhaustive discovery, to present any other evidence of racially discriminatory bias on the part of defendants, their claims brought pursuant to 42 U.S.C. § 1981 and the equal protection clause must be dismissed. Accordingly, defendants' motion for summary judgment on these claims is granted.

CROSS MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' DUE PROCESS CLAIM

Plaintiffs also contend that defendants' failure to provide unsuccessful bar examinees with any opportunity to have the grading of their examinations reviewed, either by a bar examiner or by the North Carolina Supreme Court, violates due process. Defendants disagree, arguing that pursuant to the recent unpublished opinion of the Fourth Circuit in **Rogers v. Supreme Court of Virginia, supra,** the methods they employ do provide unsuccessful applicants with adequate due process. Plaintiffs, on the other hand, contend that **Rogers** supports their position and assert that they are entitled to judgment as a matter of law on this claim.

Through the affidavits of Fred P. Parker, III and Francis I. Parker, defendants outline the procedures which an applicant may follow after learning that he or she has failed the bar examination. Those procedures include the following. Applicants who fail the examination may come to the offices of the Board to review their own examination papers and to compare their answers to two answers to the same question written by persons who took

the examination and who, in the Board' opinion, wrote the best answers.[2] A failed applicant may also bring someone with him to assist in reviewing the examination. A failed applicant is told his MBE score and his total score on the examination. Since June of 1985, failed applicants have also been permitted to have their score on each essay question in the examination.

Failed applicants may also obtain, at their own expense, copies of their examination papers. Applicants are not permitted to obtain copies of the selected correct answers. Applicants may also have, at their own expense, their MBE answer sheets regraded by hand by the testing service.

Other than these procedures, unsuccessful examinees have no further opportunity to have their examinations reviewed. There is also no procedure by which an applicant can appeal his failing grade, either to the Board or to the North Carolina courts. However, an applicant who has failed the examination has the right to retake the examination an unlimited number of times. Before 1981, the examination was given once a year, but since then, it has been given twice a year, so an unsuccessful applicant may now retake the examination every six months.

Plaintiffs assert that the aforementioned procedures do not adequately comport with the strictures of due process. Specifically, they assert that unsuccessful applicants should be afforded a hearing with respect to their failed examination papers for purposes of (1) challenging the scores assigned by defendants to each question contained in the examination; (2) seeking a regrading of examina-

---

[2]The use of co-examinees' answers is a recent innovation. Formerly, unsuccessful applicants were permitted to compare their answers with model answers used by the Board in grading the examinations.

tion papers in the event computational errors are committed; (3) seeking re-evaluation of scores assigned where it appears that the grading decision has been arbitrary; (4) presenting witnesses, cross-examinging adversaries and having representation of counsel to support their challenges; (5) challenging whether a particular examiner has correctly applied defendants' general grading policies; (6) comparing their examination papers with those of successful applicants; and (7) determing in what areas of law, if any, the plaintiffs were deficient in writing their examinations. Plaintiffs assert that pursuant to **Richardson v. McFadden,** 540 F.2d 744, 752 (4th Cir. 1976), **on rehearing en banc,** 563 F.2d 1130 (4th Cir. 1977), **cert. denied,** 435 U.S. 968 (1978), defendants' policy of providing multiple opportunities to retake the examination is insufficient as a matter of law to comport with the requirements of due process.

In **Richardson,** the Court of Appeals dealt with the constitutionality of the South Carolina bar exam with respect to black applicants. The initial panel concluded that the bar examiners acted arbitrarily and capriciously in violation of both the due process and equal protection clauses in failing two of the four plaintiff bar applicants. Deferring the question of the adequacy of post-deprivation procedures to the South Carolina Supreme Court, the court rejected defendant's contention that the right of reexamination satisfied the requirements of due process.

> It is true that some courts have held that reexamination is a more effective remedy than review because the administrative burden of allowing challenges was perceived to be too great. We are not persuaded.
> 540 F.2d at 752 (footnotes omitted).

On rehearing en banc, the full court rejected the panel's conclusion that the rights of the two applicants

had been violated and affirmed the district court's decision dismissing the case in defendant's favor. Thus, the panel's decision was vacated and it consequently no longer binds this court. **North Carolina Utilities commission v. F.C.C.**, 552 F.2d 1036 (4th Cir.), **cert. denied**, 434 U.S. 874 (1977); 9 J. Moore, B. Ward, and J. Lucas, Moore's Federal Practice # 235.02 (2 Ed. 1985). However, in finding that plaintiffs' rights had not been violated, the full court did not need to reach the issue of adequate post-deprivation review. Thus, the panel's decision on that issue was not expressly reversed, and it consequently may be considered by this court as an expression of how the Court of Appeals might rule should the issue arise again.

However, the court's decision in **Rogers v. Supreme Court of Virginia, supra,** must also be considered. As with the panel opinion in **Richardson,** the **Rogers** opinion carries no precedential value, since it was not published. **See** Fourth Circuit Rule 18 (d) and Local Rule 5.04. However, it too gives the court some guidance on the issue of adequate due process remedies for failed bar examinees. In **Rogers,** an unsuccessful black applicant to the Virginia State Bar filed an action in the United States District Court for the Eastern District of Virginia alleging equal protection, due process and antitrust violations. She had failed the bar examination in February and July, 1980, July, 1982 and February, 1983. After receiving the result of the July, 1980 and July, 1982 examinations, she sought and received a review of the essay portions of her exam. That review consisted of an interview with one of the bar examiners, who went over her individual exam with her.

After the February, 1983 examination, the Virginia Board of Bar Examiners informed all unsuccessful examinees, including plaintiff, that a review of the essay portion of the exam would be available only to those who

had failed that portion of the exam two or more times and who had not previously had a review of their examination. By these terms, Rogers was not entitled to a review of her exam. She petitioned the Supreme Court of Virginia to review the Board's adverse determination of her February, 1983 examination. The Supreme Court declined to do so. She subsequently brought this action against the Virginia-~~Supr~~eme Court and the Board of Bar Examiners.

In affirming the district court's dismissal of the action, the Court of Appeals concluded that the review procedures of the Supreme Court and the Board afforded disappointed bar examinees adequate due process. The court cited with approval **Tyler v. Vickery, supra,** for the proposition that an opportunity for reexamination provides an adequate means of exposing grading errors and that due process does not require that a hearing be granted to a bar examinee for the purpose of contesting the results of an examination. **See also Whitfield v. Illinois Board of Law Examiners,** 504 F.2d 474 (7th Cir. 1974); **Lucero v. Ogden,** 718 F.2d 355 (10th Cir. 1983), **cert. denied,** 104 S.Ct. 1308 (1984). Pointing out that "the content of due process varies with each factual context, **Hannah v. Larche,** 363 U.S. 420 (1960),"[3] the court went on to state the following:

> At the time of Rogers' complaint, the Virginia Board of Bar Examiners permitted an examinee to take the bar examination five times and to obtain a review of failing examination twice. We do not think that due process requires that a state bar examining agency provide an unlimited number of opportunities to retake an examination, or an unlimited number of reviews of failing examinations. We

> do not think that an examinee has an absolute right to have a failing examination reviewed by the state supreme court. Therefore, we believe that Rogers has not stated a claim of a due process violation.

Slip Op. at 5-6.

This court agrees that every alleged violation of due process must be considered in its factual context. Procedures regarding the rights of failed bar examinees can and have varied widely, yet each state's procedures may comport with the requirements of due process. In this action, plaintiffs contend that North Carolina's procedures do not meet due process requirements because there is no opportunity for the applicant to review his examination with a bar examiner and there is no opportunity to appeal the decision that a particular applicant failed the examination, either to the full Board or the the North Carolina Supreme Court.

However, upon review of the state's procedures, and in the context of this case, the court must disagree. Failed applicants are permitted to go over their examinations, accompanied by a friend, and compare their answers with answers which the Board determined to be particularly well written. The inclusion of a bar examiner at this juncture would not significantly aid the applicant in learning in what areas he or she needs to improve. Furthermore, as the Court of Appeals stated in **Rogers**, neither a hearing nor Supreme Court review are absolute rights which must be afforded to a failed bar applicant.

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[3]**See also Richardson v. McFadden, supra,** 563 F.2d at 1131 (en banc).

Thus, the court concludes that the Board's procedure of permitting unsuccessful applicants to review their examinations and to retake the bar examination an unlimited number of times is sufficient to comport with the requirements of due process.[4] Had plaintiffs been able to show that racial bias was evident in the grading of examinations, the court's decision might have been different. Clearly, the right to retake the examination would not protect against intentionally discriminatory grading. However, plaintiffs were unable to offer anything more than pure conjecture in support of this claim. Where the only claim is that a particular examination was graded arbitrarily, the examinees' due process rights are adequately protected by his right to retake the examination an unlimited number of times.

Accordingly, for the reasons set out herein, plaintiffs' motion for summary judgment is denied, defendants' motion for summary judgment is granted, and this action is dismissed.[5]

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

January 6, 1986

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[4]The practice of permitting unlimited opportunity to retake the examination is particularly important. The panel in **Richardson**, in rejecting **Tyler** and **Whitfield**, specifically noted that at the time of the district court's opinion, South Carolina permitted an applicant only three opportunities to take the examination. 540 F.2d at 752 n.20.

[5]Based on the foregoing, defendants' motion in limine will be denied as moot.

UNITED STATES COURT OF APPLEALS
FOR THE FOURTH CIRCUIT

No. 86-1511

LARRY DEAN BOWENS, ET AL

Appellants

versus

THE BOARD OF LAW EXAMINERS FOR THE STATE OF NORTH CAROLINA, ET AL

Appellees

ORDER

We have considered the petition for rehearing and the motion to stay the mandate and are of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that both the said petition and the said motion shall be, and they hereby are, denied.

With the concurrences of Judge Phillips and Judge Ervin.

For the Court

APPENDIX C

SUPREME COURT OF NORTH CAROLINA
J. GREGORY WALLACE, CLERK
AREA CODE 919 733-3723 P. O. BOX 2170
RALEIGH, NORTH CAROLINA 27602

February 22, 1983

D. Lester Diggs
P. O. Box 906
Aiken, SC 29801

Re: Admission to the NC Bar

We have received your petition to this Court for review of your failure to pass the North Carolina Bar Exam. I have discussed the matter with the Court and am writing this for your information.

The Rules Governing Admission to the Practice of Law in North Carolina, which have been reviewed and approved by this Court, govern your circumstances. Section .1000 of the Rules permits an unsuccessful applicant to review his examination paper at the Board's offices and to have a copy of it. No provisions are set out to allow an appeal from the failure to pass the examination.

Section .1400 of the Rules, "Judicial Review," permits appeal from "an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination" if the board withholds the license to practice law. There is no right of appeal provided from a board determination that the applicant has failed the examination.

Should you, however, find some specific right of appeal in your circumstances, you must then follow the procedures set out in Section .1400. This would require your

APPENDIX D

notice of appeal to the Superior Court of Wake County and appeal to this Court from the decision of the Superior Court.

Accordingly, since you have shown no grounds to invoke the jurisdiction of the Supreme Court at this time, I have been directed by the Court to return your petition to you unfiled. I also enclose a copy of the Board's rules for your use.

Very truly yours,

J. Gregory Wallace
Clerk of the Supreme Court

Enclosures

Copy to: Mr. Fred P. Parker, III

STANDARD DEVIATION ANALYSIS OF THE SUCCESS RATE OF BLACK APPLICANTS ON THE NORTH CAROLINA STATE BAR EXAMINATION 1974-1983

Year	Total No. of Applicants	No. of Black Applicants	No. of White App.	Percent Black App.	Percent White App.
Feb. 1983	194	55	139	28.0	72.0
July 1983	564	69	495	12.0	88.0
Feb. 1982	139	32	107	23.0	77.0
July 1982	552	88	464	16.0	84.0
Feb. 1981	194	56	138	29.0	71.0
July 1981	521	66	455	13.0	87.0
July 1980	651	92	559	14.0	86.0
July 1979	614	103	511	17.0	83.0
July 1978	509	91	418	18.0	82.0
July 1977	594	100	494	17.0	83.0
July 1976	575	112	463	19.0	81.0
July 1975	515	77	438	15.0	85.0
July 1974	524	62	462	12.0	88.0

NOTE: Computations for Binomial Model for Statistical Analysis

n = total number of applicants passing examination

p = percent of Black applicants

q = 1 - p = percent of White applicants

APPENDIX E

Total Number Passed	Number of Blacks Passed	Number of Whites Passed	* Expected Number of Blacks Passed	** Standard Deviation	*** Number of Standard Deviations
100	14	86	28	4.5	-3.11
393	16	377	47	6.4	-4.8
72	6	66	17	3.6	-3.1
371	15	356	59	7.1	-6.2
102	11	91	30	4.6	-4.1
428	23	405	56	7.0	-4.7
447	20	427	63	7.3	-5.9
439	28	411	75	7.9	-5.9
422	30	392	80	7.9	-6.3
542	60	482	92	8.7	-3.7
446	35	411	85	8.3	-6.0
469	45	424	70	7.7	-3.2
453	13	440	54	6.9	-5.9

* Expected Number = np

* Standard Deviation = $\sqrt{npq}$

*** Number of Standard Deviations = **Observed Number - Expected Number** / Standard Deviation

Computations based on data supplied by the Board of Law Examiners of the State of North Carolina

Supreme Court, U.S.
FILED
APR 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LARRY DEAN BOWENS, *et al.*,
Petitioners,

v.

THE BOARD OF LAW EXAMINERS
OF THE
STATE OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

E. OSBORNE AYSCUE, JR.*
JAMES G. MIDDLEBROOKS
SMITH HELMS MULLISS & MOORE
227 North Tryon Street
Charlotte, North Carolina 28202
(704) 372-9510

Attorneys for Respondents

* Counsel of Record

April 1987

QUESTIONS PRESENTED

1. Whether the bar examination procedure employed by the Board of Law Examiners, which affords a disappointed applicant the right to retake the examination an unlimited number of times, satisfies the requirements of due process.

2. Whether the petitioners' Sherman Act claims are barred by the "state action" exemption to the antitrust laws.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
APPENDIX	1a
Appendix A	
N.C. Gen. Stat. § 84-15 (1985)	1a
N.C. Gen. Stat. § 84-17 (1985)	1a
N.C. Gen. Stat. § 84-21 (1985)	3a
N.C. Gen. Stat. § 84-24 (1985)	5a
N.C. Gen. Stat. § 84-36 (1985)	7a
Appendix B	
Decision of United States Court of Appeals for the Fourth Circuit in *Rogers* v. *Court of Virginia*, No. 84-1746, decided August 22, 1985	8a

TABLE OF AUTHORITIES

Cases	Page
Baker v. *Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954)	6
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977)	8
Bowens v. *Board of Law Examiners*, 57 N.C. App. 78, 291 S.E.2d 170 (1982)	6
California Retail Liquor Dealers Ass'n v. *Midcal Aluminium, Inc.*, 445 U.S. 97 (1980)	8
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978)	7
Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982)	8
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	8
Hannah v. *Larche*, 363 U.S. 420 (1960)	5
Hoover v. *Ronwin*, 466 U.S. 558 (1984)	7-9
In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906)	6
In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981)	6
In re Willis, 288 N.C. 1, 215 S.E.2d 771, *appeal dismissed*, 423 U.S. 976 (1975)	6
Jones v. *Board of Commissioners*, 737 F.2d 996 (11th Cir. 1984)	5
Keenan v. *Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970)	6
Lucero v. *Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984)	5
New Motor Vehicle Board v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978)	8
Parker v. *Brown*, 317 U.S. 341 (1943)	7-9
Poats v. *Givan*, 651 F.2d 495 (7th Cir. 1981)	5

Page

Rogers v. *Supreme Court of Virginia*, No. 84-1746 (4th Cir. Aug. 22, 1985) 5
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 4
Sutton v. *Lionel*, 585 F.2d 400 (9th Cir. 1978) 5
Tyler v. *Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) 4-5
Whitfield v. *Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) 5

Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. XIV 1-2,4
15 U.S.C. § 1 3
15 U.S.C. § 2 3
42 U.S.C. § 1981 2
42 U.S.C. § 1983 2
42 U.S.C. § 2000e, *et seq.* 2
N.C. Gen. Stat. § 84-15 (1985) 1,6
N.C. Gen. Stat. § 84-17 (1985) 1,6
N.C. Gen. Stat. § 84-21 (1985) 1,6
N.C. Gen. Stat. § 84-24 (1985) 1,6,8
N.C. Gen. Stat. § 84-36 (1985) 1,6
4th Cir. I.O.P. 36.5 5

Miscellaneous

Special Project, *Admission To The Bar: A Constitutional Analysis*, 34 Vand. L. Rev. 655 (1981) 4

No. 86-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LARRY DEAN BOWENS, *et al.*,
Petitioners,

v.

THE BOARD OF LAW EXAMINERS
OF THE
STATE OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The full text of N.C. Gen. Stat. §§84-15, 84-17, 84-21, 84-24, and 84-36 is set forth in the Appendix hereto ("Resp. App.") at la-7a.

STATEMENT OF THE CASE

Petitioners are seven unsuccessful black applicants who have each taken and failed the North Carolina bar examination at least two times. In June 1982, petitioners filed this action against the Board of Law Examiners of the State of North Carolina and its individual members (collectively referred to as the "Board"), alleging that: (1) the administration and grading of the North Carolina bar examination discriminated against petitioners on the basis of their race because both the applications and the examinations were racially segregated; (2) petitioners' examinations were not graded but, rather, were arbitrarily assigned failing grades; (3) petitioners' papers were graded arbitrarily and capriciously; (4) the bar examination itself discriminated on the basis of race; and (5) the lack of a hearing in which to challenge the examination results violates due process.

Petitioners contended that the Board's examination and grading procedure violated 42 U.S.C. § 1981, 42 U.S.C. § 1983 and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, as well as the Due Process Clause of the Fourteenth Amendment.

The trial court subsequently dismissed petitioners' Title VII count in December 1982 for failure to state a claim and the remaining claims for lack of subject matter jurisdiction. While an appeal was pending before the United States Court of Appeals for the Fourth Circuit, petitioners filed petitions with the Supreme Court of North Carolina seeking review of their failures to pass the bar examination. In a letter from its Clerk, that court informed petitioner Diggs that under the Rules Governing Admission to the Practice of Law in North Carolina "[t]here is no right of appeal provided from a board determination that the applicant has failed the examination." Pet. App. 40.

"Expressing no opinion on the outcome," the Fourth Circuit remanded the case for reconsideration in light of

this letter from the Clerk of the Supreme Court of North Carolina. On remand, the District Court retained jurisdiction over petitioners' due process claim but dismissed the statutory claims. Extensive discovery then followed.

On September 10, 1985, petitioners sought leave to amend their Complaint to assert that the Board's actions violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.[1] Respondents subsequently moved for summary judgment on all pending counts. The petitioners then filed a cross-motion for summary judgment on the due process claim only. On January 6, 1986, the District Court denied petitioners' motion to amend their Complaint, denied their cross-motion for summary judgment, and granted the Board's motion for summary judgment on all counts. Pet. App. 19-38. On appeal, the Fourth Circuit affirmed in an unpublished *per curiam* opinion. Pet. App. 17-18.

REASONS FOR DENYING THE WRIT

1. The Review Procedures Authorized By the Board and the Ability to Retake the Bar Examination Satisfy Due Process

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[1]The proposed amendment incorporated by reference the factual allegations of the original complaint. It further alleged that the passing score on the examination was set after all papers were graded, that on eleven of thirteen examinations in the relevant period more black applicants failed the examination than passed it, and that the alleged conduct of the defendants, "which they entered into as a contract and conspiracy in restraint of trade * * * artificially reduc[ed] the number of competing black attorneys in the State of North Carolina; * * * [that] Plaintiffs were among those artificially prevented from entering into competition as attorneys in the State of North Carolina and were thereby further deprived of the right to compete as attorneys for the legal business deriving from or involving the several states of the United States including North Carolina." Although the District Court's opinion does not directly address the issue, its findings on the motion for summary judgment, Pet. App. 22-32, necessarily negate the factual allegations on which the proposed amendment was premised.

Petitioners allege that the Board's failure to provide disappointed bar applicants with any opportunity to review the grading of their exams — either by a Board member or by the Supreme Court of North Carolina — violates the procedural due process requirements of the Fourteenth Amendment. Focusing solely on the failure to provide a hearing, petitioners ignore the other review mechanisms provided by the Board:

> Applicants who fail the examination may come to the offices of the Board to review their own examination papers and to compare their answers to two answers to the same question written by persons who took the examination and who, in the Board's opinion, wrote the best answers. A failed applicant may also bring someone with him to assist in reviewing the examination. A failed applicant is told his [multistate bar examination] MBE score and his total score on the examination. Since June of 1985, failed applicants have also been permitted to have their score on each essay question in the examination.
>
> Failed applicants may also obtain, at their own expense, copies of their examination papers. Applicants are not permitted to obtain copies of the selected correct answers. Applicants may also have, at their own expense, their MBE answer sheets regraded by hand by the testing service. [Pet. App. 32-33; footnote omitted.][2]

Petitioners are certainly entitled to due process, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957), but entitlement to a hearing "does not automatically flow from a finding that procedural due process is applicable." *Tyler* v. *Vickery* 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied.* 426 U.S. 940 (1976).

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[2]In contrast to these post-examination review procedures, several States provide no opportunity for review. Special Project, *Admission To The Bar: A Constitutional Analysis*, 34 Vand. L. Rev. 655, 711-712 (1981).

What process is due depends largely on the "nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960).

Contrary to petitioners' intimation, Pet. at 9, the circuits that have addressed the issue agree that the right to retake a bar examination an unlimited number of times satisfies due process, regardless of whether there is an opportunity for a hearing. *See, e.g., Lucero* v. *Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984); *Tyler* v. *Vickery, supra.*

Other circuits have rejected due process challenges in similar circumstances even where the right to retake the examination was limited. *See, e.g., Jones* v. *Board of Commissioners*, 737 F.2d 996 (11th Cir. 1984) (limited right to review papers of applicant and others and five-time reexamination limit); *Poats* v. *Givan*, 651 F.2d 495 (7th Cir. 1981) (petition to Indiana Supreme Court allowed and four-time reexamination limit); *Sutton* v. *Lionel*, 585 F.2d 400 (9th Cir. 1978) (petition to Nevada Supreme Court and four-time reexamination limit); *Whitfield* v. *Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) (no right to review applicant's examination papers and presumptive five-time examination limit).

In a recent unpublished decision discussed by the District Court and by petitioners, *Rogers* v. *Supreme Court of Virginia*, No. 84-1746 (4th Cir. Aug. 22, 1985) (reprinted at Resp. App. 8a),[3] the Fourth Circuit cited *Tyler* and *Whitfield* with approval in upholding the review procedures employed by the Supreme Court of Virginia. The court expressly stated that due process did not require "an unlimited number of opportunities to

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[3]4th Cir. I.O.P. 36.5 states that the citation of unpublished decisions is disfavored but allows citation where counsel believes that the decision "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well * * *."

retake an examination, or an unlimited number of reviews of failing examinations." Resp. App. at 11a. Thus, there is no divergence among the circuit courts that would militate in favor of granting the writ. The due process issue has been thoroughly discussed by the circuit courts and merits no further illumination from this Court.

2. The Board's Actions Fall Within The State Action Exemption To The Sherman Act. Accordingly, the Motion to Amend was Properly Denied.

In North Carolina, as in most states, "the right to establish the qualifications to be required of one to become a practicing member of the bar" rests with the legislature. *In re Applicants for License,* 143 N.C. 1, 5, 55 S.E. 635 (1906). As the petitioners concede, Pet. at 14, the North Carolina General Assembly, in N.C. Gen. Stat. § 84-24, has delegated its rule-making power in this area to the Board of Law Examiners:

> The statute authorizes the Board of Law Examiners, subject to the approval of the Council of the North Carolina State Bar, to make such rules and regulations for admission to the Bar as in its judgment will promote the welfare of the State and the legal profession. [*In re Willis,* 288 N.C. 1, 8, 215 S.E.2d 771, 775, *appeal dismissed,* 423 U.S. 976 (1975).][4]

"The Board is, therefore, an 'administrative agency,' *Baker* v. *Varser,* 240 N.C. 260, 82 S.E.2d 90 (1954), with both judicial and delegated legislative powers." *Keenan* v. *Board of Law Examiners,* 317 F.Supp. 1350, 1355 n.5 (E.D.N.C. 1970). As this delegation of authority makes clear, *see* N.C. Gen. Stat. §§ 84-15, 84-17, 84-21, 84-24, and 84-36, the North Carolina Supreme Court retains

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[4]*See also In re Moore,* 301 N.C. 634, 639, 272 S.E.2d 826, 829 (1981); *Bowens* v. *Board of Law Examiners,* 57 N.C. App. 78, 81, 291 S.E.2d 170, 172 (1982), a case brought by several of the petitioners but abandoned after an adverse ruling by the intermediate state appellate court.

ultimate authority over the rules and procedures proposed by the Board. Thus, because the Board's procedures are adopted pursuant to a "clearly articulated" state policy and are "actively supervised" by the North Carolina Supreme Court, its actions are exempt under the state action doctrine. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.).

Petitioners wholly fail to discuss this Court's decision in *Hoover* v. *Ronwin*, 466 U.S. 558 (1984). In *Hoover*, the Court ruled that the state action doctrine applies to the grading of bar examinations by the Arizona Supreme Court's Committee on Examinations and Admissions. Under the Arizona constitution, the Arizona Supreme Court has the authority to determine who should be admitted to practice law in the state. Pursuant to that authority, the court established the committee to examine applications for admissions to the Arizona bar but retained the authority to admit or deny admission. *Hoover*, 466 U.S. at 561. Ronwin, a disappointed applicant, challenged that the Arizona committee denied him due process and equal protection and violated the Sherman Act by "artificially reducing the numbers of competing attorneys in the State of Arizona." *Id.* at 565. After examining the delegation of power from the Arizona Supreme Court to the committee, this Court ruled that the committee's actions were exempt under the state action doctrine. The starting point for the *Hoover* Court, as is the case here, is the reasoning of *Parker* v. *Brown*, 317 U.S. 341 (1943). Basing its decision on principles of federalism and state sovereignty, the *Parker* Court refused to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of

> government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not likely to be attributed to Congress. [*Parker*, 317 U.S. at 350-351.]

In *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 360 (1977), the Court held that a state's supreme court, when acting in a legislative as opposed to judicial capacity, occupies the same position as that of a state legislature and thus its decisions in that capacity are exempt from Sherman Act liability as state action. *See also Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975). The Court has also interpreted *Parker* to apply to state administrative agencies where it is clear that the anticompetitive conduct of that agency was contemplated by the state. *See, e.g., Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) (municipal regulation of cable television industry); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (private price-fixing arrangement authorized by State); *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by state administrative board).

In the present case, it is clear that the challenged conduct is expressly *required* by N.C. Gen. Stat. § 84-24:

> The Board of Law Examiners * * * *shall* by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession * * *. [Emphasis added.]

This case is clearly distinguishable from *Goldfarb*, which involved procedures neither required nor approved by the state supreme court or state legislature.

Instead, the logic of *Hoover* and *Bates* is directly applicable here. The individual respondents here are members of a legislatively created body to which, as petitioners

concede, the North Carolina General Assembly has delegated its authority to establish qualifications for admission to the Bar. As had the Arizona Supreme Court in *Hoover*, the North Carolina Supreme Court retains approval powers over the Board's rules. Thus, although the North Carolina General Assembly has delegated its rule-making authority to the Board, the Board's actions are still subject to the ultimate approval of the North Carolina Supreme Court. Pursuant to the logic of *Hoover* and *Bates*, therefore, the conduct challenged by the petitioners is in reality the combined conduct of the North Carolina General Assembly and Supreme Court. The Board's actions are, accordingly, exempt from Sherman Act liability under the state action doctrine of *Parker* v. *Brown*. Moreover, the District Court expressly found that the Board did not engage in the conduct that the petitioners challenged as anticompetitive. Pet. App. 22-32.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

N.C. GEN. STAT. § 84-15 (1985):

Creation of North Carolina State Bar as an agency of the State.

There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

N.C. GEN. STAT. § 84-17 (1985):

Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law, the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be

competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district. A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the council until expiration of the remainder of the current term.

In addition to the 50 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1,2; 1981, c. 788, s. 3; 1985, ç. 60, s. 1.)

N.C. GEN. STAT. § 84-21 (1985):

Organization of council; publication of rules, regulations and bylaws.

Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within 120 days after this Article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the City of Raleigh not less than 20 days nor more than 30 days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this Article. The regular term of all officers shall be one year, but those first elected shall serve until January 1, 1935. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this Article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this Article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of

this Article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this Article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this Article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within 30 days, then, after the lapse of 30 days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinbefore required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this Article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this Article, may be amended by the council from time to time in any manner not inconsistent with this Article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its

minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article. (1933, c. 210, s. 7.)

N.C. GEN. STAT. § 84-24 (1985):

Admission to practice.

The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this Article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The Board of Law Examiners shall elect a member of said Board as chairman thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable said Board to perform its duties promptly and properly. The chairman and any employees shall serve for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide such assistance as may be required to enable it to perform its duties promptly and properly.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Board of Law Examiners, subject to the approval of the council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a

written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2; 1983, c. 177.)

N.C. GEN. STAT. § 84-36 (1985):

Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

APPENDIX B

UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 84-1746

EDYTHE MAE ROGERS,

Appellant,

versus

SUPREME COURT OF VIRGINIA;
VIRGINIA BOARD OF BAR EXAMINERS;

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge. (C/A No. 84-0027)

Submitted: November 2, 1984 Decided: August 22, 1985

Before MURNAGHAN, SPROUSE and WILKINSON, Circuit Judges.

(Edythe Mae Rogers, Appellant Pro Se. Gerald L. Baliles, James T. Moore, III, and Neil A. G. McPhie for Appellees.)

Per Curiam:

Edythe Mae Rogers, pro se, appeals the district court's dismissal of her suit filed pursuant to 42 U.S.C. §§ 1981, 1983, and 1985, and 15 U.S.C. §§ 1 and 15. For the reasons given below, we affirm the judgment.

Rogers sat for the Virginia Bar Examination in February 1980, July 1980, July 1982, and February 1983. After each of these examinations she was informed that she had not passed. After receiving the results of the July 1980 and July 1982 examinations, she sought and obtained a review of the essay portions of her exams. On both occasions, the review consisted of an interview with one of the bar examiners, during which she and the examiner discussed her individual examination.

After the February 1983 examination, the Virginia Board of Bar Examiners sent a form letter to all unsuccessful examinees, indicating that a review of the essay portion of the exam would be available only to those who had failed the essay portion on two or more occasions and had not previously had reviews of their examinations. Rogers, according to the terms of this letter, was not entitled to a review of her February 1983 examination. Rogers then petitioned the Supreme Court of Virginia to review the Board's adverse determination as to her February 1983 examination. The Supreme Court of Virginia declined to do so.

Rogers complains that the Board's review procedure is constitutionally inadequate. She also contends that the Virginia Supreme Court acted unconstitutionally when it refused to review the adverse determination of the Board. In addition, she claims that the state's bar examination and review process violates the antitrust laws. The district court, after finding that it had jurisdiction over the matter, dismissed the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

We think that the district court correctly decided that it had jurisdiction, on the ground that Rogers was challenging the conduct of a non-judicial proceeding. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

As to the merits of the case, we disagree with parts of the district court's reasoning; however, because we think that the district court could have dismissed the complaint for other reasons, we will affirm its judgment.

The district court reasoned that, since there is no absolute right to an appeal under the United States Constitution, *Ross v. Moffitt*, 417 U.S. 600, 606 (1974), and because all appeals before the Supreme Court of Virginia are discretionary, *McCue v. Commonwealth*, 103 Va. 870, 49 S.E.2d 623 (1905), the Virginia Supreme Court was entitled to refuse to hear Rogers' petition. We do not agree with the district court's characterization of Rogers' petition as an appeal. Because the Virginia Supreme Court has the ultimate responsibility for determining admission to the Virginia bar, *Woodard v. Virginia Board of Bar Examiners*, 454 F. Supp. 4 (E.D. Va.), *aff'd*, 598 F.2d 1345 (4th Cir. 1979), we think that, when that court reviews or declines to review a decision of the bar examiners as to an individual examinee's status, the court is acting as an administrative agency, rather than as a court of appeals. Therefore, we find it appropriate to determine whether or not Rogers' allegations concerning the review procedures of the court and the Board make out a viable claim.

A state may not deny a person a license to practice law in a manner that contravenes either the due process clause or the equal protection clause, *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238–39 (1957). We do not think that Rogers' complaint alleges a violation of either of these constitutional provisions; therefore, we believe that Rogers has failed to state a claim under 42 U.S.C. § 1983.

In regard to the due process issue, this Court has not formulated precise guidelines for what process is due to disappointed bar examinees. However, our review of the law on this subject convinces us that the review procedure provided by the Virginia Board of Bar Examiners satisfies the requirements of due process. It is generally held that the opportunity for reexamination provides an adequate means of exposing grading errors. *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974). Also, it has been decided that due process does not require that a hearing be granted to a bar examinee for the purpose of contesting the results of an examination, *Tyler v. Vickery*, *supra*, or that an applicant be permitted to see his examination papers and compare them with model answers, *Whitfield v. Illinois*, *supra*. One circuit has concluded that the lack of an established procedure for review of examinations by the state supreme court does not render the state bar entrance rules unconstitutional. *Feldman v. State Board of Bar Examiners*, 438 F.2d 699 (8th Cir. 1971).

In view of these precedents, and guided by the principle that the content of due process varies with each factual context, *Hannah v. Larche*, 363 U.S. 420 (1960), we conclude that Virginia's bar examination review procedures are adequate under the due process clause. At the time of Rogers' complaint, the Virginia Board of Bar Examiners permitted an examinee to take the bar examination five times and to obtain a review of failing examinations twice. We do not think that due process requires that a state bar examining agency provide an unlimited number of opportunities to retake an examination, or an unlimited number of reviews of failing examinations. We do not think that an examinee has an absolute right to have a failing examination reviewed by the state supreme court. Therefore, we believe that Rogers has not stated a claim of a due process violation.

Rogers has failed to state an equal protection claim, because she has not alleged with specificity that she, a black female, has been treated differently from persons who are not black or female.

Rogers' claim under 42 U.S.C. § 1981 is not viable because she has not alleged differential treatment on account of her race.

Rogers' claim under 42 U.S.C. § 1985 fails because she has not alleged facts to indicate that the defendants conspired to deprive her of the equal protection of the laws or equal privileges and immunities under the laws. *Griffin v. Breckinridge*, 403 U.S. 88, 102-03 (1971).

Rogers has not stated a claim under 15 U.S.C. §§ 1 and 15 because any action by the defendants in this case falls within the state action exemption to the antitrust laws. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

For the foregoing reasons, we affirm the district court's judgment. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.

AFFIRMED.